CSUNT FILTED

DIVISION FALS

ENTRY OF WASHINGTON

NO. 44839-4

COURT OF APPEALS OF THE STATE OF WASHINGTO

UNION BANK, N.A., successor-in-interest to the FDIC, as Receiver for Frontier Bank,

RESPONDENT

VS.

GRANVILLE A. BRINKMAN, an individual; JUDY M. OLSON, d/b/a JMO ENTERPRISES; and JUDY M. OLSON, an individual,

APPELLANTS.

BRIEF OF UNION BANK, N.A.

RESPONDENT

Matthew A. Goldberg, WSB #37410 Allison C. Bizzano, WSB #45809 ASSAYAG • MAUSS A Limited Liability Partnership 2018 156th Avenue, NE, Suite 100 Bellevue, Washington 98007 (425) 748-5055

Attorneys for Respondent, Union Bank, N.A.

TABLE OF CONTENTS

		<u>Page</u>			
I.	STAT	STATEMENT OF THE CASE			
II.	ARGUMENT4				
	A.	Standard of Review4			
	B.	The Deed of Trust Did Not Secure Brinkman and Olson's Guaranties			
	<i>C</i> .	The Deed of Trust Act affirmatively provides for the Bank's deficiency action as a matter of law and does not provide the defense asserted by Brinkman and Olson.			
		The Deed of Trust Act Expressly Authorizes Union Bank's Deficiency Action Against Brinkman and Olson			
		2. Legislative History Supports the Trial Court's Ruling			
	D.	D. Brinkman and Olson Expressly and Unambiguously Waived Any Anti-Deficiency Defenses They May Have Had			
III.	CON	CLUSION21			
		APPENDIX			
A.	RCW	RCW 61.24.100 (1990)			
B.	RCW	RCW 61.24.100 (1998)			
C.		H.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998)			
D.		S.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess (Wash. 1998)			

TABLE OF AUTHORITIES

	Page(s)
CASES	
Bain v. Metropolitan Mortgage Group, 125 Wn.2d 83, 285 P.3d 34 (2012)	20
Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985)	21
Donovick v. Seattle–First Nat'l Bank, 111 Wn.2d 413, 757 P.2d 1378 (1988)	14, 16
Fruehauf Trailer Co. of Canada Ltd. v. Chandler, 67 Wn.2d 704, 409 P.2d 651 (1966)	18, 20
Glasebrook v. Mutual of Omaha Insurance Co., 100 Wn. App. 538, 997 P.2d 281 (2000)	13
Glenham v. Palzer, 58 Wn. App. 294, 792 P.2d 551 (1990)	14
Save Columbia CU Comm. v. Columbia Cmty. Credit Union, 134 Wn. App. 175, 139 P.3d 386 (2006)	19
Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 297 P.3d 677 (2013)	20
Scott v. Cingular Wireless, 160 Wn.2d 843, 161 P.3d 1000 (2007)	19
Seattle First Nat'l Bank v. West Coast Rubber, Inc., 41 Wn. App. 604, 705 P.2d 800 (1985)	18, 20
State v. Tracer, 173 Wn.2d 708, 272 P.3d 199 (2012)	13
Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 911 P.2d 1301 (1996)	8
Thompson v. Smith, 58 Wn. App. 361, 793 P.2d 449 (1990)	14

Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 154 P.3d 882 (2007)
Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 952 P.2d 590 (1998)
STATUTES
Deed of Trust Act, Title 61.24 RCW
RCW 19.100.220(2)
RCW 19.118.13018
RCW 21.20.430(5)
RCW 50.40.010
RCW 51.04.060
RCW 61.24
RCW 61.24.042
RCW 61.24.100
RCW 61.24.100(3)
RCW 61.24.100(3)(a)(i)
RCW 61.24.100(3)(c)
RCW 61.24.100(4)
RCW 61.24.100(5)
RCW 61.24.100(6)
RCW 61.24.100(10)
RCW 62A.9A-602 & cmt
LICC Article 9

OTHER AUTHORITIES

38 Am.Jur.2d, <i>Guaranty</i> § 67	18
38A C.J.S., Guaranty § 125 (2008)	18
H.B. Rep. on Engrossed Substitute S.B. 6191, 55th	15
S.B. Rep. on Engrossed Substitute S.B. 6191, 55th	16

I. STATEMENT OF THE CASE

On or about November 21, 2006, J.M.O. Development, LLC, a Washington limited liability company, ("Borrower" or "JMO") executed a Promissory Note ("Note") in favor of Frontier Bank in the original principal amount of \$1,250,000. CP 10-11. Borrower also executed a Construction Loan Agreement, in favor of Frontier Bank, which is dated November 21, 2006. CP 12-19. The Note is secured by a validly perfected, first-priority Deed of Trust ("Deed of Trust") in certain real property located in the City of Tacoma, County of Pierce, State of Washington, as more particularly described in the Deed of Trust ("Property"). CP 20-28. The Deed of Trust was executed by Borrower, as grantor, in favor of Frontier Bank, as beneficiary, on or about November 21, 2006. CP 20, 27. The Deed of Trust was properly recorded on December 1, 2006. CP 20.

As additional credit support for the Loan, Granville Brinkman ("Brinkman") executed a Commercial Guaranty ("Brinkman Guaranty") in favor of Frontier Bank on or about October 13, 2008. CP 29-31. Additionally, Judy M. Olson ("Olson") DBA JMO Enterprises executed a Commercial Guaranty ("JMO Enterprises Guaranty") in favor of Frontier Bank on or about October 13, 2008. CP 32-34. As additional credit support for the Loan, Olson executed a Commercial Guaranty ("Olson")

Guaranty") in favor of Frontier Bank on or about May 7, 2007. CP 35-37. Hereinafter, the Brinkman Guaranty, JMO Enterprises Guaranty, and Olson Guaranty shall at times be referred to collectively as the "Guaranties" and Brinkman and Olson shall at times be referred to collectively as the "Guarantors." Under the Guaranties, each Guarantor also agreed that recourse thereunder may be had against his or her separate property and community property. CP 29, 32, 35. (Hereinafter, the Note, the Deed of Trust, the Guaranties, the Change in Terms Agreement, and any other documents executed in connection with the Loan, shall at times be referred to collectively as the "Loan Documents.")

Beginning no later than November 21, 2008, Borrower defaulted under the Loan Documents by failing to, among other things, make the required lump sum payment to Frontier Bank upon maturity. CP 5, 54-55. Pursuant to RCW 61.24.042, a Notice of Default was transmitted to Borrower and Guarantors on or about March 26, 2009. CP 56-58. Pursuant to RCW 61.24.042, the Trustee caused a Notice of Trustee's Sale to be transmitted to Borrower and Guarantors on or about May 22, 2009, which was properly recorded that same day. CP 59-63. On or about April 30, 2010, all rights, title and interest under the Loan Documents were assigned to Union Bank by the FDIC as Receiver for Frontier Bank. CP 5, 367. Pursuant to RCW 61.24.042, the Trustee caused a Second Amended

Notice of Trustee's Sale to be transmitted to Borrower and Guarantors on or about October 1, 2010, which was properly recorded on October 4, 2010. CP 64-69. On April 1, 2011, a Trustee's Sale took place after Borrower and Guarantors failed to cure the events of default set forth in the Notice of Default. CP 72. A Trustee's Deed conveying the Property to Union Bank was recorded on April 27, 2011. CP 70-74.

Defendants Olson and Brinkman executed Commercial Guaranties ("Guaranties") in favor of Frontier Bank, whereby they unconditionally agreed to provide Frontier Bank with an additional source of repayment, independent of the collateral for the Loan, should Borrower default on its obligations under the Note and Deed of Trust. CP 29-31, 35-37. The Guaranties contain clearly marked sections concerning waivers. CP 30, 36. There is a section titled, in capital letters, "GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS," which provides that by signing the Guaranty, a guarantor makes the waivers with "full knowledge of the significance and consequence" of doing so. CP 30, 36.

The Guaranties contain a waiver of "all rights or defenses based on . . . any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale." CP 29-30, 35-36.

II. ARGUMENT

This Court should affirm the trial court ruling that Union Bank is entitled to a judgment on the Commercial Guaranties against Brinkman and Olson. This is the correct result both as a matter of contract interpretation and statutory construction of the Deed of Trust Act, Title 61.24 RCW ("Deed of Trust Act" or "Act").

A. Standard of Review

This Court reviews *de novo* both the trial court's rulings and the propriety of its statutory construction. "A court's objective in construing a statute is to determine the legislature's intent." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909-11, 154 P.3d 882 (2007). Application of these standards should result in affirmance.

B. The Deed of Trust Did Not Secure Brinkman and Olson's Guaranties.

Brinkman and Olson's arguments regarding the proper construction of the Deed of Trust Act is wrong; a lender may bring a deficiency action against a guarantor regardless of whether the guaranty is secured by the grantor's deed of trust. This Court need not reach this issue here, however, because Brinkman and Olson's Guaranties were not secured by the Deed of Trust in the first instance. Brinkman and Olson's arguments that the Guaranties were secured by the Deed of Trust, by virtue of its "payment" and "performance" section, coupled with the

definition of "Related Documents," are incorrect because they ignore whose obligations the parties intended to secure. The Deed of Trust states that the obligations of "payment" and "performance" secured by the Deed of Trust are those of JMO, the "Grantor," not those of Brinkman and Olson, the "Guarantor[s]."

Brinkman and Olson's arguments focus on the following Deed of Trust provision stating that the Borrower granted the Deed of Trust to secure "payment" and "performance":

THIS DEED OF TRUST, INCLUDING ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THE DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND **ACCEPTED ON THE FOLLOWING TERMS:**

CP 21 (emphasis added). From there, Brinkman and Olson look to the definition of the term "Related Documents," which includes, among its laundry list of generic document types, the word "guaranties." CP 27. Brinkman and Olson argue the Deed of Trust secures *their* performance under the Guaranties (as opposed to JMO's performance under the Note), even though—as discussed below—other terms in the Deed of Trust evince a contrary intent.

Brinkman and Olson's reliance on this "payment" and "performance" section is misplaced because they refuse to read it in its entirety. The Deed of Trust is "given and accepted" to secure payment and performance only "on the following terms." Those "terms," which appear in the very next section of the Deed of Trust, define precisely whose "payment" and "performance" is secured—and it is *not* the guarantors'. This section is entitled "PAYMENT AND PERFORMANCE" and it provides as follows:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor's obligations under the Note, this Deed of Trust and the Related Documents.

CP 21. (emphasis added). The Deed of Trust defines "Grantor" exclusively as JMO. CP 26. Thus, the Deed of Trust secures only the "payment" and "performance" of JMO's obligations under the Loan and other "Related Documents," not the Guarantors' separate obligations under the "Guarant[ies]."

That the Deed of Trust secures only JMO's obligations, and not Brinkman and Olson's, is further evidenced by the "FULL PERFORMANCE" section, which states that reconveyance shall occur when "Grantor" pays or otherwise performs:

FULL PERFORMANCE. If Grantor pays all the Indebtedness, when due, and otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and Personal Property . . .

CP 24 (emphasis added). The Deed of Trust is discharged only when "Grantor"—JMO, not the "Guarantor[s]" Brinkman and Olson—"pays" and "performs." There is no suggestion the Deed of Trust was intended to secure the obligations of guarantors.

Additionally, the parties did not include Brinkman and Olson's specific Guaranties in the definition of "Related Documents." "Related Documents" are defined as "all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents ... executed in connection with the indebtedness." CP 27. While the list includes the word "guaranties," it does not include the word "Guaranty," which is a defined term that applies exclusively to Brinkman and Olson's Guaranties. CP 26. That the specific term "Guaranty" does not fall within the generic term "guaranties" is illustrated by the Deed of Trust's reference to the analogous terms "Note" and "promissory notes." The "payment and performance" provision states that the Deed of Trust secures the Grantor's performance under the "Note" and "Related

Documents," meaning that the generic term "promissory notes" in the latter does not include the separately defined term "Note." So it is with "Guaranty" and "guaranties"; the generic term does not include the specific term. Thus, not only does the Deed of Trust only secure performance by JMO, but Brinkman and Olson's Guaranties are not "Related Document[s]."

Based on the plain language of the Deed of Trust alone, this Court should conclude that the Deed of Trust only secured JMO's obligations under the Loan Documents, not Brinkman and Olson's separate and independent obligations on the Guaranties. Tellingly, Brinkman and Olson have never represented—to the trial court or this Court—that their intent was for their Guaranties to be secured by the Deed of Trust. See Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (context rule allows courts to look at circumstances surrounding the making of a contract). On the contrary, examination of the Note executed by JMO and the Guaranties executed by Brinkman and Olson supports the trial court's conclusion. The Note identifies the Deed of Trust as the instrument securing it; the Guaranties, conspicuously, do not. CP 10-11 (Note); CP 29-31, and 35-37 (Guaranties). Had the parties intended Brinkman and Olson's Guaranties to be secured by the Deed of Trust, like JMO's Note, it is reasonable to expect them to have said so in

their written contract. They did not.

Finally, Brinkman and Olson's interpretation of the Deed of Trust simply is unreasonable given the entire context of the parties' transaction. This Court must reach a commercially reasonably interpretation of the Loan Documents. Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 705, 952 P.2d 590 (1998) (court must recognize "the context" commercial and [offer] "a commercially reasonable construction"). Brinkman and Olson are not parties to the Deed of Trust. They offered no security for their Guaranties. From the lender's perspective, securing a guarantor's obligations with the same Deed of Trust that secures the borrower's underlying debt would accomplish nothing. The whole point of a guaranty is to obtain an additional source of credit support that will protect the lender in the event the sale of the property secured by the borrower's deed of trust fails to satisfy the debt. There is no benefit to the lender whatsoever if the same property is used to secure both the borrower's primary obligation and the guarantors' secondary obligation. For this reason, too, this Court should affirm the trial court's judgment.

C. The Deed of Trust Act affirmatively provides for the Bank's deficiency action as a matter of law and does not provide the defense asserted by Defendants.

The Deed of Trust Act affirmatively permits Union Bank to seek a deficiency judgment in this case. The statute does not mean what Brinkman and Olson say it does. To the contrary, one of the purposes of the Legislature's enactment of the 1998 amendment to RCW 61.24.100 was to clarify that, in commercial transactions, guarantors were liable for deficiency judgments after a nonjudicial foreclosure. The plain meaning of the Deed of Trust Act and its legislative history support the trial court's judgment and likewise require affirmance.

1. The Deed of Trust Act Expressly Authorizes Union Bank's Deficiency Action Against Brinkman and Olson.

The Deed of Trust Act affirmatively authorizes this action. The relevant part of the Act begins with a blanket prohibition on actions for a deficiency judgment against any borrower, grantor, or guarantor except "as permitted" in RCW 61.24.100 with respect to "commercial loans." The Act then authorizes limited deficiency actions against commercial borrowers and grantors to recovery for waste and wrongful retention of rents. RCW 61.24.100(3)(a)(i). Critically, the Act contains no similar limitations on deficiency actions against commercial guarantors:

This chapter does not preclude..., [s]ubject to this section [RCW 61.24.100], an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

RCW 61.24.100(3)(c). The only two limitations on a deficiency action against a guarantor of a commercial loan—other than requisite notice under RCW 61.24.042—are that it must be brought within one year and that the guarantor can request judicial determination of the property's "fair value." RCW 61.24.100(4) & (5). Neither limitation is implicated here.

A different result arises under RCW 61.24.100(6) if a guarantor grants his or her own deed of trust to secure its guaranty. Under this section, where the guarantor grants a deed of trust on his or her principal residence to secure his or her guaranty, the lender still may seek a deficiency judgment. That deficiency judgment, however, is limited to recovery for waste and/or wrongful retention of rents, just as it would against a borrower or grantor. RCW 61.24.100(6). Because Brinkman and Olson did not grant deeds of trust encumbering their own personal residence, subsection (6) does not apply here.

This significance of this subsection is the way in which it evinces the legislative intent behind the amendments to the Deed of Trust Act; to wit, RCW 61.24.100(6) confirms that RCW 61.24.100(3)(c) broadly permits deficiency actions against all guarantors of commercial loans. The

legislature enacted subsection (6) to limit subsection (3)(c)'s broad grant of authority in one particular situation, i.e., when a guarantor grants a deed of trust encumbering his or her personal residence to secure the obligations of the guaranty.

Moreover, the plain meaning of RCW 61.24.100(6) conflicts with Brinkman and Olson's interpretation of RCW 61.24.100(10). By its clear terms, subsection (6) *permits* a limited deficiency judgment against a guarantor when the guaranty is secured by a foreclosed deed of trust. Yet, at the same time, Brinkman and Olson argue that subsection (10) *precludes* deficiency actions against guarantors whose obligations are secured by a foreclosed deed of trust. Which is it? Brinkman and Olson's interpretation places subsections (6) and (10) in direct conflict.

The Court can avoid this conflict by giving RCW 61.24.100(10) its plain and reasonable meaning. Subsection (10) provides:

A Trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.

RCW 61.24.100(10). On its face, this subsection has nothing to do with a lender's right to seek a "deficiency judgment" against borrowers and guarantors, a situation addressed in RCW 61.24.100(3) and (6). The phrase "deficiency judgment" appears nowhere in subsection (10). Where

the legislature intended the Deed of Trust Act to refer to actions for a "deficiency judgment," it used that precise term. RCW 61.24.100(3)(a)(i) ("an action for a deficiency judgment"); RCW 61.24.100(3)(c) (same); RCW 61.24.100(6) ("shall be subject to a deficiency judgment").

Subsection (10) is concerned with multiple debts and a lender's right to foreclose nonjudicially on a deed of trust without there being any effect on actions to collect other debts *not* secured by that deed of trust. Subsection (10) creates no prohibition on deficiency actions against guarantors with secured, or unsecured, for that matter, guaranties.

"It is a basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings." *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012). In addition, courts "do not infer a prohibition absent specific language to that effect, unless the statute as a whole directs that conclusion." *Glasebrook v. Mutual of Omaha Ins. Co.*, 100 Wn. App. 538, 545, 997 P.2d 981 (2000).

This Court should reject Brinkman and Olson's efforts to twist subsection (10) from a provision that was intended to permit lenders to pursue separate debts into one that is construed to prohibit lenders from bringing an action for a deficiency judgment. Brinkman and Olson's construction is contrary to the plain language of RCW 61.24.100(3)(c) and RCW 61.24.100(6) and thwarts a primary purpose of the Deed of Trust

Act—in incredibly common commercial lending scenarios like the one in this case, lenders would be forced under Appellants' statutory construction to file lawsuits on guaranties prior to nonjudicial foreclosure or initiate judicial foreclosure actions in lieu of a nonjudicial foreclosure altogether whenever it appears that the value of the foreclosed property will be insufficient to cover the entire debt; otherwise, the guaranties bargained for by lender would always be worthless. As explained below, this absurd result, which would upend the daily business of secured commercial lending in Washington, was not intended by the legislature.

2. Legislative History Supports the Trial Court's Ruling.

Even if the Court were to find subsection (10) subject to more than one reasonable construction, the Act's legislative history confirms the trial court's interpretation. Prior to 1998, the Act did not address whether a deficiency judgment could be sought from a guarantor after a deed of trust was foreclosed. See RCW 61.24.100 (1990) (App. A). Washington courts also declined to decide the Act's effect on guarantor liability. See, e.g., Glenham v. Palzer, 58 Wn. App. 294, 298 n.4, 792 P.2d 551 (1990); Thompson v. Smith, 58 Wn. App. 361, 367 n.4, 793 P.2d 449 (1990).

This silence left an unsettling uncertainty. Although nonjudicial foreclosures under the Deed of Trust Act were intended to be "efficient and inexpensive" remedies vital to lending, *Donovick v. Seattle–First*

Nat'l Bank, 111 Wn.2d 413, 417, 757 P.2d 1378 (1988) (citation omitted), the lack of clarity surrounding lenders' right to pursue guarantors after a nonjudicial foreclosure might make those same lenders opt for the longer, more expensive process of judicial foreclosure. Thus came the push for legislative clarification of the Deed of Trust Act to expressly allow lenders to seek deficiency judgments from guarantors after nonjudicial foreclosure.

That clarification became law through the 1998 amendments. A committee of the Washington State Bar Association drafted Engrossed Substitutive Senate Bill ("ESSB") 6191, enacted as Chapter 295 of the 1988 Session Laws and codified in RCW 61.24. The House Bill Report for ESSB 6191 summarized three conditions a lender had to meet in order to seek a deficiency judgment against a guarantor of a commercial loan:

The beneficiary may seek a deficiency judgment against a guarantor of the commercial loan if certain conditions are met, including the following: (1) the action must be commenced within one year; (2) the guarantor must have been given notice of the trustee's sale that contains the guarantor's rights and defenses, and an opportunity to cure the default; and (3) the guarantor may ask the court to determine the fair value of the property, and the amount of the deficiency is the amount owed by the guarantor to the beneficiary less the greater of either the fair value of the property or the price paid at the sale.

H.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998) (App. C). These conditions are now reflected in RCW

61.24.100(3)(c), (4) and (5). Noticeably absent from the legislature's analysis is any suggestion that subsection (10) provides a further limit on deficiency actions against guarantors or, more specifically, that deficiency judgments are prohibited if the deed of trust secures both the borrower's and guarantor's obligations. Nothing in the legislative history of the Deed of Trust Act supports Brinkman and Olson's reading of subsection (10).

The Senate Final Bill Report for ESSB 6191 noted the drafters' intent "to avoid time consuming and expensive judicial foreclosure proceedings and to save time and money for both the borrower and the lender." S.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998) (App. D). Brinkman and Olson's construction of the amended statute would undo the effort and intent of the legislature, because, as noted above, it would force lenders to opt for judicial foreclosure. Indeed, the Washington Supreme Court has refused to construe the Deed of Trust Act in a manner that "would ignore the intent of the statutory scheme and give an unjustified, unwarranted windfall to the debtor—a windfall completely without merit in logic or equity in principle." *Donovick*, 111 Wn.2d at 416.

This Court should similarly reject the Guarantors' arguments here, which are based on a statutory construction that ignores the intent of the statutory scheme and would give guarantors—who, like Brinkman and

Olson, agreed to guarantee the borrower's debt "absolutely" and "unconditionally"—an unwarranted and illogical windfall. This Court can and should affirm on this basis as well.

D. <u>Brinkman and Olson Expressly and Unambiguously</u> Waived Any Anti-Deficiency Defenses They May Have Had.

Union Bank was entitled to judgment in its favor based on the proper interpretation of the Deed of Trust and construction of the Deed of Trust Act. But even if Brinkman and Olson had an anti-deficiency defense in this instance, they voluntarily waived it, and that enforceable waiver provides an independent basis for affirmance of the trial court. In the Guaranties, Brinkman and Olson agreed to:

... waive[] any and all rights or defenses based on suretyship or impairment of collateral including, but not limited, any rights or defenses arising by reason of ... 'anti-deficiency' law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale

CP 29-30, 35-36. The Guaranties contain a separate provision, "GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS," which further demonstrates the clarity, conspicuousness and completeness of the waiver. CP 30, 36. Brinkman and Olson each signed an acknowledgement, which appears immediately above the signature line, that they read and agreed to all the provisions of the guaranty. CP 31, 37.

Brinkman and Olson do not claim that they did not have an opportunity to read or understand the plain import of these waivers.

Rather, Brinkman and Olson argue that the waivers are unenforceable as a matter of law. They are not. At common law, a guarantor's surety and statutory defenses "may be explicitly waived in a guaranty agreement and such waiver provisions are enforceable." 38A C.J.S., *Guaranty* § 125 (2008); *also* 38 Am.Jur.2d, *Guaranty* § 67 ("the guaranty may provide, by its terms, that the guarantor remains liable despite the release of the principal debtor"). This rule has long been recognized by Washington courts. *See, e.g., Fruehauf Trailer Co. of Can. Ltd. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966) (upholding guarantor's waiver of defense of discharge); *Seattle First Nat'l Bank v. West Coast Rubber, Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985) (upholding guarantor "waivers of virtually all of surety defenses").

The Deed of Trust Act did not disturb this black letter law. When the legislature intends to deny contracting parties the freedom to bargain away statutory rights, it says so expressly. *See, e.g.,* RCW 19.118.130 (waiver of rights under lemon law void); RCW 19.100.220(2) (same result under franchise act); RCW 21.20.430(5) (securities act); RCW 50.40.010 (unemployment compensation); RCW 51.04.060 (workers-compensation).

Indeed, in the commercially analogous context of UCC Article 9, the legislature prohibited waivers of a debtor's rights upon default, but preserved the common law rule permitting waiver of guarantor defenses. RCW 62A.9A-602 & cmt. ("Washington variations of this section ... preserve the ability of a guarantor to waive suretyship defenses"). Had the legislature intended to preclude parties from waiving guaranty defenses under the Deed of Trust Act, it would have said so, as well. *See Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 191, 139 P.3d 386 (2006) (legislature's use of language in only one of two similar situations suggests a different legislative intent). This Court should find the legislature's refusal to do so conclusive on this issue.

Moreover, the waiver is not void as against "public policy" as Brinkman and Olson argue. "An agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (citation and internal quotation marks omitted). Other than their strained reading of RCW 61.24.100(10) itself, Brinkman and Olson cannot articulate how enforcing a guarantor's express waiver of anti-deficiency defenses in the context of a *commercial* loan injures the public good or frustrates the policies underlying the Deed of Trust Act. It would not. As discussed above, the legislature recognizes that *commercial* guarantors do

not have the same anti-deficiency rights as borrowers and, thus, the default rule is that a lender *may* seek a deficiency judgment against guarantors. RCW 61.24.100(3)(c). Even if subsection (10) creates a limited exception to that default rule, allowing sophisticated parties to agree to the application of subsection (10) instead does not offend public policy.

Washington Supreme Court's decisions in Bain v. Metropolitan Mortgage Group, Inc., 175 Wn.2d 83, 107-08, 285 P.3d 34 (2012); and Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 297 P.3d 677 (2013), do not require a different outcome. Neither case addresses RCW 61.24.100(10), deficiency judgments, commercial loans, guaranties or the enforceability of express waivers by sophisticated parties like Brinkman and Olson. Nor do they disturb prior cases such as Fruehauf Trailer or Seattle First Nat'l Bank. Rather, in both cases the that parties cannot contractually waive "statutory Court held requirements" to a nonjudicial foreclosure sale. Bain, 175 Wn.2d at 107-08; Schroeder, 177 Wn.2d at 107. As the Court noted, the rule that a person can ordinarily waive "rights or privileges" does not apply to procedural requisites because they "are not, properly speaking, rights held by the debtor; instead, they are limits on the Trustee's power to foreclose without judicial supervision." Schroeder at 107.

These conditional procedural requirements to foreclosure must be followed (and may not be contractually altered) to protect other interested parties (like junior lienholders) and prevent future title disputes—two key purposes of the Deed of Trust Act. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Here, the waivers in the Commercial Guaranties do not seek to alter the mechanics of a nonjudicial foreclosure sale or redefine any well-established principles of foreclosure or mortgage law. The Court's concern in these other cases for protecting homeowners from the likes of MERS has no applicability in a commercial transaction between sophisticated parties like Brinkman and Olson and their commercial lender.

III. CONCLUSION

Union Bank urges affirmance. The contracts and controlling law demonstrate that the trial court's judgment for Union Bank was correct. Brinkman and Olson agreed absolutely and unconditionally to cover the debt of JMO to induce the bank to make the loan. This Court, therefore, should enforce the rights and obligations for which the parties bargained.

Respectfully submitted on this 14th day of August, 2013.

ASSAYAG * MAUSS

A Limited Liability Partnership

By:

MATTHEW A. GOLDBERG, WSB 37410

mattg@amlegalgroup.com
ALLISON C. BIZZANO, WSB 45809
allisonb@amlegalgroup.com

Attorneys for Respondent, Union Bank, N.A.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2013, I caused to be served the foregoing **BRIEF OF RESPONDENT** on the following parties at the following addresses:

Margaret Archer Gordon Thomas Honeywell LLP 1201 Pacific Avenue, Suite 2100 PO Box 1157 Tacoma, WA 98401 Attorney for Appellant Granville A. Brinkman marcher@gth-law.com Brian M. King
Ingrid L.E. McLeod
Davies Pearson, P.C.
920 Fawcett
PO Box 1657
Tacoma, WA 98402
Attorneys for Appellant Judy M.
Olson
bking@dpearson.com
imcleod@dpearson.com

by:		
	\boxtimes	U.S. Postal Service, ordinary first class mail
	H	U.S. Postal Service, certified or registered mail, return receipt requested
	H	hand delivery
		facsimile
	Ă	electronic service other (specify)
		other (specify)
		MARKET LIL

MATTHEW A. GOLDBERG

WSB 37410

APPENDIX TO BRIEF OF RESPONDENT (UNION BANK N.A.)

- A. RCW 61.24.100 (1990)
- B. RCW 61.24.100 (1998)
- C. H.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998)
- D. S.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg. Reg. Sess. (Wash. 1998)

1990 SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION
FIFTY-FIRST LEGISLATURE
Convened January 8, 1990. Adjourned March 8, 1990.

IST EXTRAORDINARY SESSION FIFTY-FIRST LEGISLATURE Convened March 9, 1990. Adjourned April 1, 1990.

2nd EXTRAORDINARY SESSION FIFTY-FIRST LEGISLATURE Convened June 5, 1990. Adjourned June 5, 1990.



Published at Olympia by the Statute Law Committee pursuant to Chapter 6, Laws of 1969.

DENNIS W. COOPER Code Reviser (j) That the grantor or any successor in interest has recourse to the courts pursuant to RCW 61.24.130 to centest the alleged default on any proper ground.

Sec. 2. Section 10, chapter 74, Laws of 1965 and RCW 61.24.100 are each amended to read as follows:

Forcelesure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust forcelesed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, except that if such obligation was not incurred primarily for personal, family, or household purposes, such forcelesure shall not preclude any judicial or nonjudicial forcelesure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation. Where forcelesure is not made under this chapter, the beneficiary shall not be precluded from enforcing the security as a mortgage nor from enforcing the obligation by any means provided by law.

Passed the Senate February 6, 1990. Passed the House March 2, 1990. Approved by the Governor March 19, 1990. Filed in Office of Secretary of State March 19, 1990.

CHAPTER 112 [Senate Bill No. 6528] VESSEL PILOT'S LICENSE—QUALIFICATIONS

AN ACT Relating to qualifications for a vessel pilots' license; and amending RCW 88,16,090,

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 8, chapter 18, Laws of 1935 as last amended by section 2, chapter 264, Laws of 1987 and RCW 88.16.090 are each amended to read as follows:

(1) A person may pilot any vessel subject to the provisions of this chapter on waters covered by this chapter only if appointed and licensed to pilot such vessels on said waters under and pursuant to the provisions of this

(2) A person is eligible to be appointed a pilot if the person is a citizen of the United States, over the age of twenty-five years and under the age of seventy years, a resident of the state of Washington at the time of appointment and only if the pilot applicant holds as a minimum, a United States government license as a master of ((freight and towing vessels not more than one thousand gross-lons (inspected vessel))) ocean or near constations or motor vessels of not more than one thousand six hundred gross tons or as a master of inland steam or motor vessels of not more than one

Rev. Code Wash. (ARCW) § 61.24.100 ANNOTATED REVISED CODE OF WASHINGTON 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

*** Statutes current through 2012 Second Special Session and 2012 general election. ***

TITLE 61. MORTGAGES, DEEDS OF TRUST, AND REAL ESTATE CONTRACTS

CHAPTER 61.24. DEEDS OF TRUST

- § 61.24.100. Deficiency judgments -- Foreclosure -- Trustee's sale -- Application of chapter
- (1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.
- (2) (a) Nothing in this chapter precludes an action against any person liable on the obligations secured by a deed of trust or any guarantor prior to a notice of trustee's sale being given pursuant to this chapter or after the discontinuance of the trustee's sale.
- (b) No action under (a) of this subsection precludes the beneficiary from commencing a judicial foreclosure or trustee's sale under the deed of trust after the completion or dismissal of that action.
- (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
- (a) (i) To the extent the fair value of the property sold at the trustee's sale to the beneficiary or an affiliate of the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee's sale, an action for a deficiency judgment against the borrower or grantor, if such person or persons was timely given the notices under RCW 61.24.040, for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful

retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary.

- (ii) This subsection (3)(a) does not apply to any property that is occupied by the borrower as its principal residence as of the date of the trustee's sale;
- (b) Any judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclosed; or
- (c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.
- (4) Any action referred to in subsection (3)(a) and (c) of this section shall be commenced within one year after the date of the trustee's sale, or a later date to which the liable party otherwise agrees in writing with the beneficiary after the notice of foreclosure is given, plus any period during which the action is prohibited by a bankruptcy, insolvency, moratorium, or other similar debtor protection statute. If there occurs more than one trustee's sale under a deed of trust securing a commercial loan or if trustee's sales are made pursuant to two or more deeds of trust securing the same commercial loan, the one-year limitation in this section begins on the date of the last of those trustee's sales.
- (5) In any action against a guarantor following a trustee's sale under a deed of trust securing a commercial loan, the guarantor may request the court or other appropriate adjudicator to determine, or the court or other appropriate adjudicator may in its discretion determine, the fair value of the property sold at the sale and the deficiency judgment against the guarantor shall be for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater, plus interest on the amount of the deficiency from the date of the trustee's sale at the rate provided in the guaranty, the deed of trust, or in any other contracts evidencing the debt secured by the deed of trust, as applicable, and any costs, expenses, and fees that are provided for in any contract evidencing the guarantor's liability for such a judgment. If any other security is sold to satisfy the same debt prior to the entry of a deficiency judgment against the guarantor, the fair value of that security, as calculated in the manner applicable to the property sold at the trustee's sale, shall be added to the fair value of the property sold at the trustee's sale as of the date that additional security is foreclosed. This section is in lieu of any right any guarantor

would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale.

- (6) A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i) of this section. If the deed of trust encumbers the guarantor's principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee's sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor's obligation.
- (7) A beneficiary's acceptance of a deed in lieu of a trustee's sale under a deed of trust securing a commercial loan exonerates the guarantor from any liability for the debt secured thereby except to the extent the guarantor otherwise agrees as part of the deed in lieu transaction.
- (8) This chapter does not preclude a beneficiary from foreclosing a deed of trust in the same manner as a real property mortgage and this section does not apply to such a foreclosure.
- (9) Any contract, note, deed of trust, or guaranty may, by its express language, prohibit the recovery of any portion or all of a deficiency after the property encumbered by the deed of trust securing a commercial loan is sold at a trustee's sale.
- (10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.
- (11) Unless the guarantor otherwise agrees, a trustee's sale shall not impair any right or agreement of a guarantor to be reimbursed by a borrower or grantor for a deficiency judgment against the guarantor.
- (12) Notwithstanding anything in this section to the contrary, the rights and obligations of any borrower, grantor, and guarantor following a trustee's sale under a deed of trust securing a commercial loan or any guaranty of such a loan executed prior to June 11, 1998, shall be determined in accordance with the laws existing prior to June 11, 1998.

HISTORY: 1998 c 295 § 12; 1990 c 111 § 2; 1965 c 74 § 10.

HOUSE BILL REPORT ESSB 6191

As Passed House - Amended: March 3, 1998

Title: An act relating to deeds of trust.

Brief Description: Changing statutes affecting deeds of trust.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators

Johnson, Roach and Fairley).

Brief History:

Committee Activity:

Law & Justice: 2/25/98, 2/26/98 [DPA].

Floor Activity:

Passed House - Amended: 3/3/98, 98-0.

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended. Signed by 13 members: Representatives Sheahan, Chairman; McDonald, Vice Chairman; Sterk, Vice Chairman; Costa, Ranking Minority Member; Constantine, Assistant Ranking Minority Member; Carrell; Cody; Kenney; Lambert; Lantz; Mulliken; Robertson and Sherstad.

Staff: Edie Adams (786-7180).

Background: A deed of trust is a type of security interest in real property. Basically, a deed of trust is a three-party mortgage. The borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary).

The major benefit of a deed of trust as opposed to a mortgage is that the deed of trust may be nonjudicially foreclosed, whereas a mortgage may only be foreclosed judicially. If the grantor defaults on the loan obligation, the trustee may foreclose on the real property as long as certain procedural and notice requirements are met.

The trustee of a deed of trust may be a domestic corporation, a title insurance company, an attorney, a professional corporation whose shareholders are licensed attorneys, an agency of the United States government, or a bank or savings and loan association. A

s.1 .s

ESSB 6191

trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee.

In order for a deed of trust to be nonjudicially foreclosed, the following requirements must be met: (1) the deed contains a power of sale and provides that the real property is not used principally for agricultural purposes; (2) a default has occurred which makes the power of sale operative; (3) the deed has been recorded; (4) a notice of default is sent at least 30 days before a notice of sale is recorded; and (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust.

To initiate foreclosure procedures the trustee must: (1) file a notice of trustee's sale 90 days before the sale; (2) send notice of the sale to the grantor, beneficiary, and any other person with a recorded interest in the land; (3) post the notice on the property or personally serve any occupants; and (4) publish the notice of sale in a newspaper at specified dates.

The sale may not take place less than 190 days from the date of default. Any person other than the trustee may bid at the sale. After sale of the property there is no right of redemption and no right to a deficiency judgment. However, on commercial obligations, foreclosure on the deed of trust does not preclude a judicial or nonjudicial foreclosure of any other deed of trust, mortgage, or other security interest or lien granted on the obligation.

The proceeds of the foreclosure sale are distributed first to the expenses of sale and the obligation secured by the deed of trust, and the surplus is deposited with the clerk of the court. Any interests or liens on the real property that are climinated by the sale attach to the surplus proceeds.

Summary of Bill: A number of provisions of the Deed of Trust Act are amended. A definition section is added for terms used throughout the chapter, including "grantor," "beneficiary," "trustee," "borrower," and "guarantor."

The types of entities that may serve as a trustee are amended to exclude domestic corporations, unless at least one officer is a Washington resident, that are not wholly owned by a professional entity that is wholly owned by licensed attorneys, and to include escrow agents and professional limited liability entities if they are wholly owned by licensed attorneys.

The beneficiary of a deed of trust may replace the trustee without a requirement that the trustee first resign. Recording of the appointment of a successor trustee by the beneficiary vests all powers of the original trustee in the successor.

Several changes are made to the requirements of a notice of trustee's sale: notice must be given to occupants of property consisting of a single-family residence, condominium, cooperative, and dwelling with less than five units; the notice must identify personal

property that may be sold and any other action that is pending to foreclose on another security; the notice must specify the potential effects of foreclosure on the occupants of the property; and the two time periods during which the trustee must publish in a legal newspaper the notice of sale are lengthened from five to eight days.

The beneficiary may credit bid all or any part of the obligation secured by the deed of trust at the sale. If the beneficiary is the purchaser, the amount bid by the beneficiary in excess of the credit bid must be paid in the form of cash, certified check, cashier's check, money order, or electronic transfer. If the purchaser is not the beneficiary, the entire bid must be paid in one of these forms. The trustee's sale is deemed final on the date and time that the trustee has accepted a bid if the trustee's deed is recorded within 15 days after the date of the accepted bid.

Procedures for dealing with surplus sales proceeds are established. A written notice of any surplus from the proceeds of sale must be mailed, along with the notice of sale and an affidavit of mailing, to each party to whom the original notice of sale was sent. The written notice of surplus and the affidavit of mailing must also be deposited, along with the surplus proceeds, with the clerk of the superior court. A party who seeks disbursement of surplus funds must file a motion seeking disbursement with the superior court and must mail notice of the motion to all parties to whom the trustee mailed the notice of surplus.

A deficiency judgement is not available after a trustee's sale except for a deed of trust securing a commercial loan. The beneficiary may seek a deficiency judgment against the borrower in the following two situations, but only if the fair value of the property sold at the trustee's sale is less than the obligation, and if the property is not occupied by the borrower as a principal residence: (1) for a decrease in the fair market value in the property caused by abusive or destructive use of the property by the borrower; or (2) for damages caused by the wrongful retention of rents, insurance proceeds, or condemnation awards.

The heneficiary may seek a deficiency judgment against a guarantor of the commercial loan if certain conditions are met, including the following: (1) the action must be commenced within one year; (2) the guarantor must have been given notice of the trustee's sale that contains the guarantor's rights and defenses, and an opportunity to cure the default; and (3) the guarantor may ask the court to determine the fair value of the property, and the amount of the deficiency is the amount owed by the guarantor to the beneficiary less the greater of either the fair value of the property or the price paid at the sale.

Procedures following the dissolving of a restraining order or bankruptcy stay on the foreclosure sale are amended. A new provision is added that states that the procedures applicable to a new sale ordered by a court upon dissolution of a restraining order or stay

ESSB 6191

are permissive only and do not prohibit the trustee from continuing with a sale on a properly continued sale date.

A receiver may be appointed by the court in a foreclosure action on a mortgage or deed of trust without a showing of danger of injury to the property if the mortgagee or beneficiary has a perfected assignment of rents.

It is a violation of the Consumer Protection Act for any person to offer, offer to accept, or accept from another person consideration of any type not to bid or to reduce a bid at a trustee's sale. It is not a violation of the Consumer Protection Act for a person to state that the property is being sold in an "as-is" condition or for the beneficiary to arrange to provide financing for a particular bidder.

A beneficiary may not force tenants of a single-family residence, condominium, cooperative, or other dwelling with less than five units to pay rent to the beneficiary without providing the tenant with a court order or a written consent by the landlord. It is a defense to eviction on the basis of nonpayment of rent that the tenant paid the rent to the beneficiary under a court order or a landlord's written consent.

Various technical and clarifying amendments are made.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill is the same as the house bill as it passed to the Senate. There is a suggested amendment to clarify when a receiver may be appointed in a foreclosure action on a mortgage or deed of trust when the mortgagee or beneficiary has a perfected assignment of rights.

Testimony Against: None.

Testified: Gordon Tanner, Washington State Bar Association (pro).

APPENDIX D

FINAL BILL REPORT

ESSB 6191

C 295 L 98

Synopsis as Enacted

Brief Description: Changing statutes affecting deeds of trust.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Johnson, Roach and Fairley).

Senate Committee on Law & Justice House Committee on Law & Justice

6.

Background: A deed of trust is a financing tool created by statute which is, in effect, a triparty mortgage. The real property owner or purchaser (the grantor of the deed of trust) conveys the property to an independent trustee, who is usually a title insurance company, for the benefit of a third party (the lender) to secure repayment of a loan or other debt from the grantor (borrower) to the beneficiary (lender). The trustee has the power to sell the property nonjudicially in the event of default, or, alternatively, foreclose the deed of trust as a mortgage. Nonjudicial foreclosure is not available if the property involved is used principally for agricultural or farming purposes.— Furthermore, the deed of trust must provide its own terms for sale.

The Deed of Trust Act, adopted in 1965, establishes a streamlined, statutory method for foreclosing on deeds of trust. It was designed to avoid time consuming and expensive judicial foreclosure proceedings and to save time and money for both the borrower and lender.

Practice in this area has departed somewhat from the strict statutory requirements, resulting in a perceived need to clarify and update the act. In 1997 the Governor vetoed SB 5554, regulating deeds of trust, for lack of adequate public exposure and comment. This bill is proposed by the Washington State Bar Association.

Summary: The Deed of Trust Act is amended to clarify and modernize its procedures, and reflect current practices. A definition section is added. The list of those who can act as a trustee is revised. Trustees must maintain a street address for personal service.

Notice provisions are revised. New requirements are added to notify more people who are affected by the deed or by a foreclosure and sale. Several types of notices must be more detailed to give more information to the affected parties, including tenants, the borrower, and guarantors (i.e. co-signers). The processes and requirements for giving notice are more streamlined and defined.

Requirements are placed on participants that enhance their accessibility and ease the mechanics of the foreclosure process. The process for giving notice is streamlined and obligations are specifically defined. When a bankruptcy is also occurring, provisions are added to minimize unnecessary delay in a foreclosure sale.

Ambiguities about court involvement and other requirements are clarified, and when a trustee's sale is final is made clear. It is clarified that a receiver may be appointed for any of the independent reasons listed; more than one is not necessary.

Unnecessary involvement by extra parties is eliminated. The beneficiary has more direct power over the trustee.

Sale details and procedures are specified. Consumer Protection Act coverage is added for interfering with a sale. Liability of borrowers and guarantors after sale is defined.

Votes on Final Passage:

Senate 44 0

House 98 0 (House amended) Senate 49 0 (Senate concurred)

Effective: June 11, 1998